

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 17-cv-00210-RBJ

LIST INTERACTIVE, LTD. D/B/A UKNIGHT INTERACTIVE,

Plaintiff,

v.

KNIGHTS OF COLUMBUS, and
DAVID J. KAUTTER, IN HIS OFFICIAL CAPACITY AS (ACTING) COMMISSIONER OF
THE INTERNAL REVENUE SERVICE,

Defendants.

KNIGHTS OF COLUMBUS,

Counterclaim Plaintiff,

v.

LIST INTERACTIVE, LTD. D/B/A UKNIGHT INTERACTIVE,
LEONARD S. LABRIOLA, WEBSINC.COM, INC., STEPHEN S. MICHLIK, JONATHAN S.
MICHLIK, and TERRY A. CLARK,

Counterclaim Defendants.

**PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT KNIGHTS OF
COLUMBUS**

Plaintiff, LiST Interactive, Ltd. d/b/a UKnight Interactive (“UKnight”), through counsel, hereby moves for sanctions against Defendant Knights of Columbus and states as follows:

CERTIFICATION OF CONFERRAL

Counsel for Plaintiff conferred with counsel for Defendant, including by providing a copy of this motion, prior to filing.

BACKGROUND

Throughout this case, Knights of Columbus fought to avoid the production of any membership data and, even after three Court orders for production of the data, has resorted to efforts to impede UKnight's ability to assess the membership issue.

In 2017, the Court ordered Knights of Columbus to produce its membership data to UKnight. Despite the 2017 order, Knights of Columbus argued in 2018 that it should not be required to produce its membership data to UKnight. In March 2018, the Court entered a second order in which the Knights of Columbus were required to produce membership coupons reflecting the total members Knights of Columbus purported to have in each of its local councils. (Dkt. 118 at 26 ("UKnight is entitled to the July 1, 2017 'Council Statement – Summary and Payment Coupon' that was issued to each council.")) The Court also ordered that UKnight was entitled to obtain the true and accurate number of membership cards actually issued to dues-paying members of the local councils as of July 1, 2017. (*Id.*) As UKnight described at the time, its purpose in seeking the membership coupons for councils in the United States and Canada was to compare the data contained in those coupons with the information obtained from the financial secretary of each local council to determine how materially Knights of Columbus overstates its membership. UKnight sought membership coupons from the United States and Canada because those members represent the Knights of Columbus' insurance market. Pursuant to the Court's 2018 order, Knights of Columbus produced approximately 10,200 membership coupons in the TIFF file format reflecting the purported membership of local councils in the United States.

At the same time UKnight's prior counsel withdrew from the case, Knights of Columbus produced to UKnight only 96 responses to a survey asking for the number of membership cards

actually issued by the local councils to dues-paying members in 2017. Upon entering the case, current counsel for UKnight analyzed the survey responses from these 96 councils by manually extracting the membership data from each council's corresponding coupon. This manual analysis showed a discrepancy of more than 20 percent between the purported membership reflected in the coupons and the true number of members reported by the financial secretaries. UKnight, however, needed more than 96 survey responses in order to have a sample size sufficient to more broadly assess Knights of Columbus' overstatement of its membership rolls, and in a discovery hearing on May 13, 2019, the Court held that the 96 responses out of more than 10,000 total councils were inadequate. The Court ordered Knights of Columbus to comply with the Court's past and present orders requiring production of the membership data, or face potential entry of default judgment. It ordered Knights of Columbus to take whatever steps necessary to obtain survey responses from its local councils.

The manual analysis performed by current counsel for UKnight in early 2019 was the first time UKnight had reason to know that the only way to efficiently, accurately, and reasonably analyze the data for all 10,000 coupons would be to extract it using an automated system, and import that data into a spreadsheet. UKnight determined that the TIFF files were not legible enough to ingest using an automated system and asked Knights of Columbus if the coupons could be produced in a legible file format. Knights of Columbus then informed UKnight that the membership coupons were derived from a database. The extraction of data from a database usually involves the click of a few buttons to generate a spreadsheet or other electronically-deliverable file and typically can be performed in a few minutes. In fact, this likely was the way Knights of Columbus generated the membership coupons in the first place. In other words, Knights of

Columbus could export the coupon data to a spreadsheet, which was the very format UKnight required for its analysis, as easily or more easily than it could generate coupons from that database.

Given the difficulties UKnight had automating its coupon analysis, UKnight requested that the Knights of Columbus simply provide UKnight with the coupon data from the database instead of going through the process of producing coupons from that database which still required automated extraction. Knights of Columbus refused and, in early 2019, produced PDF files of the coupons instead.

Upon receiving the PDF files, UKnight again attempted to extract the data and again experienced significant difficulty doing so. On July 3, 2019, UKnight's counsel again emailed Knights of Columbus' counsel requesting that Knights of Columbus produce the relevant data from the national database given UKnight's inability to ingest the information from the TIFF or PDF files. (Ex. A.) The Knights of Columbus refused, stating:

The discovery request and the court's order was for the payment coupons, which we produced and re-produced. We do not have the obligation to produce the data in any other form. Further, the data in the tables is not static. It has since been updated based on changing information within the past 2 years. The payment coupons were generated based on the data in those tables as of July 1, 2017, and the PDFs of the coupons were saved in the system, which is what was produced. Thus, we do not have the obligation to and cannot produce the material you request.

(*Id.*) Having received this response, and being pressed for time given the fast-approaching trial, UKnight was forced to hire a third-party vendor specializing in technologically-assisted review of eDiscovery to extract data from the PDF files of the coupons. This cost more than \$14,000. (Ex. B.) Knights of Columbus knew time was short and marginally complied with the letter of the Court's orders but not the spirit of those orders.

Moreover, during the data extraction process, UKnight learned that despite the Court's March 2018 order that Knights of Columbus produce membership coupons for all its local councils, Knights of Columbus failed to produce the membership coupons for its councils in Canada. Knights of Columbus claims it did not produce coupons for the Canadian councils based on a purported agreement with Plaintiff's prior counsel, Mr. Jeff Vail, in which the parties agreed UKnight was only seeking coupons for councils in the United States. Mr. Vail states by sworn affidavit that he has no memory of such an agreement and believes he never would have entered into an agreement seeking only the United States coupons. (Ex. C.) Further, correspondence by Mr. Vail to Knights of Columbus demonstrates that UKnight clearly sought the United States *and* Canadian membership coupons. (Ex. D.) Based on Knights of Columbus' response to UKnight's July 3rd request for data from the database, the 2017 data for its Canadian councils no longer exists and would be impossible to produce at this point.

ANALYSIS

Knights of Columbus produced to UKnight membership coupons dated July 1, 2017 from its database in TIFF format in the summer of 2018 and in PDF format on June 14, 2019. Thus, either Knights of Columbus had the coupon data in a database as recently as June 2019, which it could easily have provided electronically but refused, or Knights of Columbus over-wrote data despite an obligation to preserve it for this litigation. In either case, a sanction is appropriate.

“Discovery—a process intended to facilitate the free flow of information between parties—is now too often mired in obstructionism.” *Security Nat. Bank of Sioux City, Iowa v. Abbott Laboratories*, 299 F.R.D. 595, 596 (N.D.Iowa 2014) (rev'd on other grounds, 800 F.3d 936 (8th Cir. 2015)). “It would appear that there is something in the DNA of the American civil justice

system that resists cooperation during discovery.”” *Id.* (quoting Hon. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L.Rev. 495, 530 (2013)). “[Obstructionist discovery] fuels the astronomically costly litigation industry at the expense of ‘the just, speedy, and inexpensive determination of every action and proceeding.’” *Id.* “Litigation calculated to harass or increase costs warrants sanctions, the merits of the case notwithstanding.” *F.D.I.C. v. Maxxam, Inc.*, 523 F.3d 566, 584 (5th Cir. 2008). To be clear, UKnight is not claiming that the attorneys for Knights of Columbus are trying to impede open disclosure of this membership data. Rather, it is the Knights of Columbus itself that has obstructed discovery of this information throughout the case. Knights of Columbus could have produced the data straight from a database but instead produced coupons it knew would be harder for UKnight to use precisely to make analysis harder and more costly and simply failed to produce the Canadian membership coupons. It is this obstruction by the Knights of Columbus that prompted the Court to order production of the data in three separate orders. This behavior by Knights of Columbus is consistent with their trying to keep this membership data covered up when they let go of UKnight in the first place.

But to the extent Knights of Columbus could not produce the coupon information directly from the database because that information been overwritten since 2017, Knights of Columbus should still be sanctioned because it failed to preserve discoverable information relevant to this litigation as required. “The court has inherent power to impose sanctions for the destruction or loss of evidence.” *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 620 (D.Colo. 2007) (citing *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D.Minn. 1989) (holding that sanctions are appropriately levied when a party is on notice that documents in its possession are

relevant to pending or potential litigation, but still abrogates its duty of preservation)). “[S]poliation is both the destruction of evidence and/or the failure to preserve evidence.” *Phillips Electronics North America Corp., v. BC Technical*, 773 F.Supp.2d 1149, 1195 (D.Utah 2001). “In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit.” *Id.* at 621.

“In determining whether sanctions are appropriate, the court must first determine whether the missing documents or materials would be relevant to an issue at trial.” *Id.* While the Court previously has determined that the membership data is discoverable, the Court has held in abeyance a final determination about whether the membership information is relevant in this matter. UKnight seeks sanctions against the Defendant for conduct described in this motion only after the Court has heard the evidence and determines the relevance of the membership data.

As described below, should the Court find such information relevant, UKnight seeks an adverse inference instruction relating to the evidence Knights of Columbus either provided in TIFF and PDF form for the purpose of increasing UKnight’s litigation costs or failed to preserve. While UKnight must establish bad faith for an adverse inference instruction, *see Turner v. Public Service Co. of Colo.*, 563 F.3d 1136, 1150 (10th Cir. 2009), it does so here. Bath faith has been described as resembling “the third prong of Rule 11’s certification requirement, which mandates that a signer of a paper warrant that the paper ‘is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation.’” *Precision Pine & Timber, Inc. v. United States*, No. 98-720 C., 2001 WL 1819224 (Fed.Cl. 2001). “[B]ad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction.” *E.E.O.C. v. Dillon Companies, Inc.*, 839 F.Supp.2d 1141, 1144 (D.Colo. 2011). “‘Bad faith’ is the antithesis

of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. It is also defined as that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.” *Cache La Poudre Feeds*, 244 F.R.D. at 235 (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (D.Colo. 1997)).

Knights of Columbus’ responses to UKnight’s requests relating to the membership database reflect Knights of Columbus’ continuing efforts to hinder UKnight’s ability to obtain and analyze membership data, even after the Court ordered several times that the data is discoverable. Critically, based on information learned from Knights of Columbus’ counsel, Knights of Columbus knew at the time that UKnight requested the membership coupons that the data in those coupons already existed in an electronic file that could be easily generated and produced. Yet, Knights of Columbus chose not to inform UKnight of that fact, did not offer to provide the information from the database, and refused to do so after UKnight specifically requested it. Knights of Columbus apparently hoped UKnight would have more difficulty extracting and analyzing the data from the coupons than it would from the electronic file Knights of Columbus could have easily produced instead.

Further, Knights of Columbus failed to produce the Canadian membership coupons in spite of the Court’s March 2018 order that required Knights of Columbus to produce coupons for each of its councils, and despite the lack of any agreement between the parties limiting discovery to coupons from councils in the United States, as Knights of Columbus now claims. Because Knights of Columbus now says data from the 2017 coupons cannot be produced in electronic format because it no longer exists, it is apparently impossible for Knights of Columbus produce the Canadian coupons to which UKnight is entitled. UKnight also has significant concerns about the

accuracy of the coupons previously produced if, in fact, the database is not static and the data from 2017 had changed by the time the Defendant was ordered to produce the 2017 coupons in July 2018.

UKnight again acknowledges that the Court has held in abeyance a final determination regarding the relevance of the membership data to this matter. If and when the Court makes that determination, Knights of Columbus' bad faith conduct supports the Court providing the following adverse inference instructions to the jury: (1) that the Defendant may not contest that its membership numbers are materially exaggerated; and (2) that the jury should infer or may infer that the motive for Knights of Columbus' conduct relating to UKnight was to cover up Knights of Columbus' materially exaggerated membership numbers.

Regardless of the Court's determination whether the membership data is relevant to this case, Knights of Columbus' purpose for not providing the data to UKnight in electronic format and failing to provide the Canadian membership coupons was, at the least, an attempt to increase the cost of UKnight's discovery and analysis of the coupon data. "[M]onetary sanctions like fines, attorneys' fees and costs may also be imposed for spoliation of evidence." *Travelers Property Cas. of America ex rel Goldman v. Pavilion Dry Cleaners*, No. Civ.A. 04-1446(JJH), 2005 WL 1366530, *4 (D.N.J. June 7, 2005). Accordingly, UKnight also seeks sanctions in the amount of \$14,000 for the cost of engaging a third party to extract data from the membership coupons.

CONCLUSION

Based on the foregoing, UKnight respectfully requests that the Court order the following sanctions against Knights of Columbus if and when it makes a final determination that the membership data is relevant to this case: (1) that the Defendant may not contest that its membership

numbers are materially exaggerated; (2) an instruction from the Court that the jury should infer or may infer that Knights of Columbus' motive for relating to UKnight was to cover up its materially exaggerated membership numbers; and (3) a monetary sanction of \$14,000 for the cost of engaging a third party to extract data from the membership coupons.

Dated: August 6, 2019

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 6, 2019, a copy of the foregoing was served via CM/ECF filing system to the following:

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